No. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 2000

Tracy Ragsdale; Warren E. Dupwe, Trustee in Bankruptcy for the Tracy Ragsdale Estate

Petitioners

Vs.

Wolverine Worldwide, Inc., doing business as Frolic Footwear, a foreign corporation doing business in the State of Arkansas

Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. Whether the District Court and the Eighth Circuit Court of Appeals erred in finding 29 C.F.R. § 825.208 and 29 C.F.R. § 825.700(a) invalid.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari be issued to review the judgement below.

OPINIONS BELOW

The panel opinion of the United States Court of Appeals for the Eighth Circuit is reported at 218 F.3d 933 (8th Cir., 2000)

The district court's decision in this case is not reported.

JURISDICTION

The United States District Court for the Eastern District of Arkansas entered an order for summary judgement against Petitioner on November 3, 1998. Petitioner then filed a Motion to Alter or Amend, which was denied and entered on August 5, 1999. Petitioner filed a Notice of Appeal with the District Court's clerk on August 11, 1999. A timely appeal was taken by Petitioner to the United States Court of Appeals for the Eighth Circuit. The Court of Appeals affirmed the District Court grant of summary judgment in an opinion entered on July 11, 2000. A timely Petition for Rehearing and Suggestion for Rehearing *en banc* was denied by Order of August 8, 2000. Pursuant to Supreme Court Rule 13.3, this Petition was filed within 90 days of the denial of rehearing. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). Jurisdiction was vested in the Court of Appeals pursuant to 28 U.S.C. § 1291. The District Court's jurisdiction was founded on 28 U.S.C. § 1331.

STATUTORY PROVISIONS AND REGULATIONS INVOLVED

29 U.S.C. § 2601

(a) Findings

Congress finds that-

(1) the number of single parent households and two-parent households in which the single parent or both parents work is increasing significantly;

(2) it is important for the development of children and the family unit that fathers and mothers be able to participate in early childrearing and the care of family members who have serious health conditions;

(3) the lack of employment policies to accommodate working parents can force individuals to choose between job security and parenting;

(4) there is inadequate job security for employees who have serious health conditions that prevent them from working for temporary periods;

(5) due to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on the women, and such responsibility affects the working lives of women more than it affects the working lives of men; and

(6) employment standards that apply to one gender only have serious potential for encouraging employers to discriminate against employees and applicants for employment who are of that gender.

(b) Purposes

It is the purpose of this Act-

(1) to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity;

(2) to entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse or parent who has a serious health condition;

(3) to accomplish the purpose described in paragraph (1) and (2) in a manner that accommodates the legitimate interest of employers;

(4) to accomplish the purposes described in paragraphs (1) and (2) in a manner that, consistent with the Equal Protection Clause of the Fourteenth Amendment, minimizes the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons (including maternity-related disability) and for compelling family reasons, on a gender-neutral basis; and

(5) to promote the goal of equal employment opportunity for women and men, pursuant to such clause.

29 C.F.R. § 825.208

(a) In all circumstances, it is the employer's responsibility to designate leave, paid or unpaid, as FMLA-qualifying, and to give notice of the designation to the employee as provided in this section. In the case of intermittent leave or leave on a reduced schedule, only one such notice is required unless the circumstances regarding the leave have changed. The employer's designation decision must be based only on information received from the employee or the employee's spokesperson (e.g., if the employee is incapacitated, the employee's spouse, adult child, parent, doctor, etc., may provide notice to the employer of the need to take FMLA leave). In any

circumstance where the employer does not have sufficient information about the reason for an employee's use of paid leave, the employer should inquire further of the employee or the spokesperson to ascertain whether the paid leave is potentially FMLA-qualifying.

(1) An employee giving notice of the need for unpaid FMLA leave must explain the reasons for the needed leave so as to allow the employer to determine that the leave qualifies under the Act. If the employee fails to explain the reasons, leave may be denied. In many cases, in explaining the reasons for a request to use paid leave, especially when the need for the leave was unexpected or unforeseen, an employee will provide sufficient information for the employer to designate the paid leave as FMLA leave. An employee using accrued paid leave, especially vacation or personal leave, may in some cases not spontaneously explain the reasons or their plans for using their accrued leave.

(2) As noted in S 825.302(c), an employee giving notice of the need for unpaid FMLA leave does not need to expressly assert rights under the Act or even mention the FMLA to meet his or her obligation to provide notice, though the employee would need to state a qualifying reason for the needed leave. An employee requesting or notifying the employer of an intent to use accrued paid leave, even if for a purpose covered by FMLA, would not need to assert such right either. However, if an employee requesting to use paid leave for an FMLA-qualifying purpose does not explain the reason for the leave--consistent with the employer's established policy or practice--and the employer denies the employee's request, the employee will need to provide sufficient information to establish an FMLA-qualifying reason for the needed leave so that the employer is aware of the employee's entitlement (i.e., that the leave may not be denied) and, then, may designate that the paid leave be appropriately counted against (substituted for) the employee's 12-week entitlement. Similarly, an employee using accrued paid

vacation leave who seeks an extension of unpaid leave for an FMLA-qualifying purpose will need to state the reason. If this is due to an event which occurred during the period of paid leave, the employer may count the leave used after the FMLA-qualifying event against the employee's 12-week entitlement.

(b)(1) Once the employer has acquired knowledge that the leave is being taken for an FMLA required reason, the employer must promptly (within two business days absent extenuating circumstances) notify the employee that the paid leave is designated and will be counted as FMLA leave. If there is a dispute between an employer and an employee as to whether paid leave qualifies as FMLA leave, it should be resolved through discussions between the employee and the employer. Such discussions and the decision must be documented.

(2) The employer's notice to the employee that the leave has been designated as FMLA leave may be orally or in writing. If the notice is oral, it shall be confirmed in writing no later than the following payday (unless the payday is less than one week after the oral notice, in which case the notice must be no later than the subsequent payday). The written notice may be in any form, including a notation on the employee's pay stub.

(c) If the employer requires paid leave to be substituted for unpaid leave, or that paid leave taken under an existing leave plan be counted as FMLA leave, this decision must be made by the employer within two business days of the time the employee gives notice of the need for leave, or, where the employer does not initially have sufficient information to make a determination, when the employer determines that the leave qualifies as FMLA leave if this happens later. The employer's designation must be made before the leave starts, unless the employer does not have sufficient information as to the employee's reason for taking the leave until after the leave commenced. If the employer has the requisite knowledge to make a

determination that the paid leave is for an FMLA reason at the time the employee either gives notice of the need for leave or commences leave and fails to designate the leave as FMLA leave (and so notify the employee in accordance with paragraph (b)), the employer may not designate leave as FMLA leave retroactively, and may designate only prospectively as of the date of notification to the employee of the designation. In such circumstances, the employee is subject to the full protections of the Act, but none of the absence preceding the notice to the employee of the designation may be counted against the employee's 12-week FMLA leave entitlement.

(d) If the employer learns that leave is for an FMLA purpose after leave has begun, such as when an employee gives notice of the need for an extension of the paid leave with unpaid FMLA leave, the entire or some portion of the paid leave period may be retroactively counted as FMLA leave, to the extent that the leave period qualified as FMLA leave. For example, an employee is granted two weeks paid vacation leave for a skiing trip. In mid-week of the second week, the employee contacts the employer for an extension of leave as unpaid leave and advises that at the beginning of the second week of paid vacation leave the employee suffered a severe accident requiring hospitalization. The employer may notify the employee that both the extension and the second week of paid vacation leave (from the date of the injury) is designated as FMLA leave. On the other hand, when the employee takes sick leave that turns into a serious health condition (e.g., bronchitis that turns into bronchial pneumonia) and the employee gives notice of the need for an extension of leave, the entire period of the serious health condition may be counted as FMLA leave.

(e) Employers may not designate leave as FMLA leave after the employee has returned to work with two exceptions:

(1) If the employee was absent for an FMLA reason and the employer did not learn the reason for the absence until the employee's return (e.g., where the employee was absent for only a brief period), the employer may, upon the employee's return to work, promptly (within two business days of the employee's return to work) designate the leave retroactively with appropriate notice to the employee. If leave is taken for an FMLA reason but the employer was not aware of the reason, and the employee desires that the leave be counted as FMLA leave, the employee must notify the employer within two business days of returning to work of the reason for the leave. In the absence of such timely notification by the employee, the employee may not subsequently assert FMLA protections for the absence.

(2) If the employer knows the reason for the leave but has not been able to confirm that the leave qualifies under FMLA, or where the employer has requested medical certification which has not yet been received or the parties are in the process of obtaining a second or third medical opinion, the employer should make a preliminary designation, and so notify the employee, at the time leave begins, or as soon as the reason for the leave becomes known. Upon receipt of the requisite information from the employee or of the medical certification which confirms the leave is for an FMLA reason, the preliminary designation becomes final. If the medical certifications fail to confirm that the reason for the absence was an FMLA reason, the employer must withdraw the designation (with written notice to the employee).

29 C.F.R. § 825.700(a)

(a) An employer must observe any employment benefit program or plan that provides greater family or medical leave rights to employees than the rights established by the FMLA. Conversely, the rights established by the Act may not be diminished by any employment benefit

program or plan. For example, a provision of a CBA which provides for reinstatement to a position that is not

equivalent because of seniority (e.g., provides lesser pay) is superseded by FMLA. If an employer provides greater unpaid family leave rights than are afforded by FMLA, the employer is not required to extend additional rights afforded by FMLA, such as maintenance of health benefits (other than through COBRA), to the additional leave period not covered by FMLA. If an employee takes paid or unpaid leave and the employer does not designate the leave as FMLA leave, the leave taken does not count against an employee's FMLA entitlement.

STATEMENT OF THE CASE

I. The Nature of the Case and the Procedural History.

On December 22, 1997, Tracy Ragsdale (Ragsdale) filed suit alleging Wolverine had violated the Family and Medical Leave Act of 1993 (FMLA) and discriminated against her in violation of the Americans With Disabilities Act (ADA). Ragsdale filed the Complaint alleging jurisdiction under 28 U.S.C. 1331. The Complaint was timely served on Wolverine, and Wolverine filed an Answer to the Complaint on February 27, 1998. Ragsdale amended her complaint on July 16, 1998 and Wolverine filed its Answer on August 3, 1998.

On June 29, 1998, Ragsdale filed a Motion for Partial Summary Judgment. Wolverine filed a Motion and Memorandum in opposition to Ragsdale's Motion for Partial Summary Judgment and moved for its own Summary Judgment on July 29, 1998. On August 13, 1998, Ragsdale filed a Response to Wolverine's Motion for Summary Judgment.

On November 3, 1998, the District Court denied Ragsdale's Motion for Partial Summary Judgment and granted Wolverine's Motion for Summary Judgment. On November 13, 1998, Ragsdale timely filed a Motion to Alter or Amend. However, on August 5, 1999, the District Court upheld its previous ruling and dismissed Ragsdale's Complaint. Ragsdale filed a Notice of Appeal on August 11, 1999.

On July 11, 2000, the United States Court of Appeals for the Eighth Circuit affirmed the District Court's ruling. Ragsdale timely filed a Suggestion for Rehearing En Banc, and the Eighth Circuit denied the suggestion on August 8, 2000. Ragsdale now timely files this Petition for Certiorari.

II. Statement of Facts Relevant to Issue on Appeal.

The Appellant, Tracy Ragsdale, began her employment with Appellee, Wolverine, on March 17, 1995. She was diagnosed with cancer in February of 1996. Appellant requested and was granted leave to undergo a biopsy and remained on leave until March 17, 1996. Appellant again requested leave on March 18, 1996 in order to undergo surgery to remove her spleen. Appellant remained on leave until the Appellee terminated her in September of 1996.

Appellee failed to designate any of Ragsdale's leave as FMLA leave and failed to give Ragsdale written notice of her FMLA rights as required under 29 C.F.R. §825.301(c). Moreover, after Ragsdale requested FMLA leave in September of 1996, she was terminated because she had exhausted all of her company leave.

After receiving treatment, Ragsdale's cancer is now in remission. Ragsdale's physician released her to work in December of 1996, and she has worked since this time.

Ragsdale filled suit against Wolverine on December 22, 1997. Ragsdale contends, that Wolverine violated the FMLA by failing to designate any of her leave as FMLA leave, and, by terminating her when she requested FMLA leave.

REASONS FOR GRANTING THE PETITION

Reason I

A split exist in the Courts with respect to the issue of whether 29 C.F.R. § 825.208 and 29 C.F.R. § 825.700(a) are valid.

Rule 10(a) of the Rules of this Court indicates that among the reasons the Court considers in granting a writ of certiorari is when a United States Court of Appeals has entered a decision in conflict with decisions of another United States Court of Appeals on the same important matter. In the case at bar, the Eighth Circuit Court of Appeals stated:

> The DOL regulations must be struck down. Although courts must defer to agency expertise, this Court cannot abrogate its mandate as the 'final authority on issues of statutory construction' and must 'reject administrative constructions which are contrary to clear congressional intent.' The DOL regulations create rights which the statute clearly does not confer. ...The DOL regulations dispense with any pretense of balancing in favor of rigid and unnecessary regulations that penalize unwary employers. ...The DOL regulations improperly convert the FMLA into a statute which always provides an additional twelve weeks of leave unless the employer specifically notifies the employee prospectively that she is using her FMLA leave. This is not consistent with the purpose of the FMLA. Congress only intended to mandate a minimum of twelve weeks of leave for employees, it did not intend to construct a trap for unwary employers who already provide for twelve or more weeks of leave to their employees. ...Consequently, this court must hold 29 C.F.R. § 700(a) invalid insofar as it purports to require an employer to provide more than twelve weeks of leave
>
> Ragsdale v. Wolverine, 218 F.3d 933, (8th Cir. 2000) (Appendix A).

The decision of the Eighth Circuit is in direct conflict with decision of the Court of Appeals for the Sixth Circuit. See Plant v. Morton Int'l, Inc., 212 F.3d 929, 934 (6th Cir ., 2000). In Plant, the Sixth Circuit stated, "Because there is a Department of Labor regulation, 29 C.F.R. § 825.208(c), that specifically discusses the requirement of notice by employers, and because we

believe that regulation to be valid, we hold that § 825.208(c) … governs the case sub judice." The Court went on to state, "In particular, 29 C.F.R. § 825.208(a), emphasizes that '[i]n all circumstances, it is the employer's responsibility to designate leave, paid or unpaid, as FMLA-qualifying, and to give notice of the designation to the employee. 29 C.F.R. § 825.208(a). …If the employer fails to give notice to the employee …, the employer may not designate the leave as FMLA leave retrospectively; only that portion of the leave following notification by the employer may be designated as FMLA leave and count against the twelve-week entitlement. See id. §825.208(c)." Id. at 935.

The Sixth Circuit opinion is directly on point and unequivocally upheld Department of Labor (DOL) regulations at issue. In adhering to and validating the DOL regulations, the Court stated:

> We see no reason why §825.208(c) should not be considered valid and applicable to this case. In the absence of specific statutory language governing a topic, agency regulations "are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. The FMLA itself is silent as to the notice an employer must give to an employee before designating his paid leave as FMLA leave. We believe that §825.208(c) evinces a reasonable understanding of the FMLA, reflecting Congress' concern with providing ample notice to employees of their rights under the statute. Moreover, because the FMLA was intended to set out minimum labor standards, we do not believe the §825.208(c) is inconsistent with legislative intent merely because it creates the possibility that employees could end up receiving more than twelve weeks of leave in one twelve month period, due to an employer's failure to notify them that the clock has started to run on their allotted period of time. We therefore disagree with McGregor v. Autozone, 180 F.3d 1305 (11th Cir. 1999), which held that §825.208(c) and 825.700(a) were in conflict with the FMLA's creation of a narrow entitlement to twelve weeks of leave and therefore invalid. Rather, we conclude that those regulations are valid and forbid employers from retroactively designating FMLA leave if they have not given proper notice to their employees that their statutory entitlement period has begun to run.

Plant v. Morton Int'l, Inc., 212 F.3d 929, 935-936 (6th Cir. 2000) (citations omitted).

The Fifth Circuit's decision in Manuel v. Westlake Polymers Corp., 66 F.3d 758 (5th Cir. 1995), recognizes the logic of the regulations' burden to designate on the employer. The Court emphasized that the regulations place on the employer the responsibility to designate leave as FMLA-qualifying, based on the information provided by the employee. "To require the employee to designate her leave as pursuant to the FMLA would render these provisions meaningless, if not directly contradict them." Id. at 762. The Court in Manuel thus not only acknowledged and relied upon the regulations at issue in this case, but also properly placed the designation obligation in the context of the respective notice responsibilities of the employer and employee, and the congressional purpose in enacting the statute. The Court went on to state:

> Neither the statutory language nor the Act's legislative history disclose congressional will regarding the content of the required notice. We are unable to say that the regulations challenged here are so patently at odds with the legislative scheme as to render them invalid.

Manuel, 66 F.3d at 763. Consequently, while Manuel addressed the interim regulations, its opinion is instructive here.

Likewise, the Fourth Circuit has applied the designation requirement with approval in Cline v. Wal-Mart, Inc., 144 F.3d 294 (4th Cir. 1998). "In the absence of proper notice, Cline was entitled to twelve weeks of FMLA leave plus five days of paid vacation leave, for a total of almost thirteen weeks away from work. Id. at 301. The Court deferred to the DOL regulations, and held that FMLA leave does not begin until the employee is properly notified. Referring to 29 C.F.R. § 825.700(a), the Court stated:

> As the word "requires" indicates, to designate employer-provided leave as FMLA leave an employer must "promptly (within two business days absent extenuating circumstances) notify the employee that the paid leave is designated and will be counted as FMLA leave." 29 C.F.R. § 825.208(b). Therefore, although an employer has the option of requiring an employee to designate vacation or other leave as FMLA, that option is waived if the

> employer fails to give proper notice of its intentions. In other words, "[i]f an employee takes paid or unpaid leave and the employer does not designate the leave as FMLA leave, the leave taken does not count against an employee's FMLA entitlement. 29 C.F.R. § 825.700(a).

Cline, 144 F.3d at 300. While neither Cline nor Manuel directly addressed the validity of the regulations at bar, these cases demonstrate the Secretary's wisdom.

The conflict that now exists between the Eighth and Eleventh Circuits and the Sixth Circuit clearly creates a situation that calls for this Court to resolve the conflict in order that there would be uniform application nationwide of the FMLA. It is therefore respectfully requested that this Court grant the Petition for Writ of Certiorari to resolve the conflict between the Court of Appeals for the Eighth Circuit and the Court of Appeals for the Sixth Circuit.

Reason II

The Eighth Circuit decided important questions of federal law which have not, but should be, settled by this court.

Congress recognized the importance of protected leave by passing the FMLA to balance the demands of work and family. Congress also delegated the responsibility of interpreting these provisions to the DOL, providing that the interpretations were not in conflict with congressional intent. 29 U.S.C. § 2654. Unfortunately, there are conflicts between the circuits regarding the DOL's interpretation of the FMLA which deserve this Court's attention. Without this attention, the FMLA's uniform application concerning both employer and employee rights cannot be realized.

The Sixth Circuit, in Plant[1], has squarely upheld the DOL's regulations interpreting the FMLA. The court stated, "We believe that [29 C.F.R.] § 825.208(c) evinces a reasonable understanding of the FMLA, reflecting Congress' concern with providing ample notice to

employees of their rights under the statute." Plant, 212 F.3d at 935. The court also specifically disagreed with McGregor[2], an Eleventh Circuit opinion that invalidated the DOL's regulations at bar.

Likewise, the Fourth and Fifth Circuits have also determined that the DOL's regulations interpreting the FMLA at bar. In Manuel[3], the Fifth Circuit recognized the validity of the DOL's regulations concerning notice to the employer without expressly mentioning FMLA and stated, "[T]heir disclaimer of any requirement that notice must expressly invoke the FMLA is a reasonable interpretation of the statutory scheme created by Congress." Manuel, 66 F.3d at 763. The court also cited Chevron[4] and stated, "Where a statute is silent or ambiguous, we limit our inquiry to 'whether the agency's answer is based on a permissible construction of the statute.' Administrative regulations promulgated in response to express delegations of authority, like the one at issue here, 'are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.'" Id.

In Cline, the Fourth Circuit also applied the DOL's regulation requiring the employer to notify the employee that leave is being designated as FMLA leave before the clock starts to run. As a result, the employee was entitled to almost thirteen weeks away from work.

In stark contrast to the circuits above, the Eighth Circuit and Eleventh Circuit has invalidated the DOL regulations, thereby creating a hopelessly confusing situation for employers and employees across the country. In McGregor v. Autozone, Inc., 180 F.3d 1305 (11th Cir. 1999), the court held that the DOL regulations requiring employers to inform employees that leave counted against FMLA before the clock began to run was invalid. The court stated,

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[1] Plant v. Morton Int'l, Inc., 212 F.3d 929 (6th Cir. 2000).
[2] McGregor v. Autozone, Inc., 180 F.3d 1305 (11th Cir. 1999)(holding that 29 C.F.R.§ 825.208(c) and § 825.700(a) were in conflict with the FMLA's creation of a narrow entitlement to twelve weeks of leave and therefore invalid.)
[3] Manuel v. Westlake Polymers Corp., 66 F.3d 758 (5th Cir. 1995).

"Whether we view FMLA as clear and find the regulation clearly contrary to the statute or whether we view FMLA as somewhat ambiguous and find the regulation manifestly contrary to the statute, the regulations are invalid and unenforceable." Id. at 1308.

In the present case, the Eighth Circuit agreed with the Eleventh Circuit and refused to recognize the regulations promulgated by the DOL. In Ragsdale v. Wolverine Worldwide, Inc., 218 F.3d 933 (8th Cir., 2000), the court concluded that the regulations must be struck down. "Although courts must defer to agency expertise, this Court cannot abrogate its mandate as the 'final authority on issues of statutory construction' and must 'reject administrative constructions which are contrary to clear congressional intent.'" Id. (See App. A at p. 10). However, the Eighth Circuit failed address whether the Secretary's interpretation was reasonable. The 6th Circuit has held that regulations at bar are a reasonable interpretation of the FMLA. By failing to address this prong of the Chevron analysis, the Eighth Circuit has impermissibly intruded in to the exclusive province of the Executive and Legislative branches.

This Court must address the two directly conflicting interpretations of the validity of DOL regulations 29 C.F.R. § 825.208(c) and § 825.700(a). Without such clarification and uniformity, employers occupying several circuits, as well as thousands of employees nationwide, will be subjected to arbitrary application of the FMLA.

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[4] Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843-844 (1984).

CONCLUSION

Given the above, this Court should grant the Writ of Certiorari in order to restore Congress' intent to serve both employers and employees, uniformly, in the balancing of the workplace and family responsibilities.

Respectfully submitted,

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Dated: September 7, 2000

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 99-3319

Tracy Ragsdale; Warren E. Dupwe, Trustee in Bankruptcy for the Tracy Ragsdale Estate,

Appellants,

v.

Wolverine Worldwide, Inc., doing business as Frolic Footwear, a foreign corporation doing business in the State of Arkansas,

Appellee.

Appeal from the United States District Court for the Eastern District of Arkansas.

Submitted: April 12, 2000
Filed: July 11, 2000

Before WOLLMAN, Chief Judge, MAGILL, Circuit Judge, and FRANK,* District Judge.

MAGILL, Circuit Judge.

This appeal considers the validity of certain regulations promulgated by the Department of Labor (DOL) under the Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. §§ 2601, et seq. The appeal arises out of a suit brought by Tracy Ragsdale against Wolverine Worldwide, Inc. (Wolverine) under the FMLA, the American's with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101, et seq, and the Arkansas Civil Rights Act of 1993 (Arkansas Act), Ark. Code Ann. § 16-123-101, et seq, alleging that Wolverine improperly denied her FMLA leave and terminated her in violation of the FMLA, ADA, and Arkansas Act. Ragsdale appeals the district court's[1] grant of summary judgment to Wolverine on her FMLA claim. We affirm the judgment of the district court.

*THE HONORABLE DONOVAN W. FRANK, United States District Judge for the District of Minnesota, sitting by designation.

I. BACKGROUND

The relevant factual background of this case is relatively simple. Ragsdale began her employment with Wolverine on March 17, 1995. She was diagnosed with cancer in February 1996 and requested medical leave from Wolverine on February 21, 1996. Wolverine granted her request, and Ragsdale's leave commenced on that date.

Wolverine's leave policy allowed employees with six months of service to take leave for up to seven months. The leave policy required employees on leave to submit requests for extensions of leave every thirty days. Consistent with that requirement, Ragsdale requested extensions of her leave on March 18, April 22, May 21, June 20, July 22, and August 15 of 1996. Each request for an extension was granted by Wolverine. Wolverine did not, however, notify Ragsdale of her leave eligibility under the FMLA or her right to have leave designated as FMLA leave.

On September 20, 1996, Ragsdale was terminated because she had exhausted her seven months of company provided leave and was unable to return to work. On

[1] The Honorable James M. Moody, United States District Judge for the Eastern District of Arkansas.

September 26, 1996, Ragsdale returned to Wolverine and requested additional FMLA leave. She was informed that she had requested and utilized all of her available leave. Ragsdale then requested that she be allowed to return to work on a reduced hour schedule. Wolverine denied her request. Ragsdale's physician released her to work in December of 1996, and she has been actively employed in full-time positions since December 31, 1996. Ragsdale is no longer being treated for cancer and is currently capable of working without restrictions.

On December 22, 1997, Ragsdale filed suit against Wolverine alleging claims under the FMLA, ADA and Arkansas Act. On November 3, 1998, the district court granted summary judgment to Wolverine on Ragsdale's FMLA claim. The court found that the DOL's regulations, which provide that unless the employer prospectively designates company leave as FMLA leave, the twelve week FMLA leave entitlement does not begin to run, are based on an erroneous interpretation of the FMLA and cannot be enforced. The district court also dismissed Ragsdale's ADA and Arkansas Act claims, holding that Ragsdale was not qualified to perform the essential functions of her job at the time of her termination. Subsequently, Ragsdale filed the present appeal.

II. ANALYSIS

Ragsdale claims that the district court erred in invalidating the DOL's regulations and dismissing her FMLA claim. She claims that because Wolverine never formally designated any of the seven months of company leave as FMLA leave, DOL regulations properly mandate that the clock never began to run on her FMLA leave. Thus, Ragsdale contends that she was denied twelve weeks of FMLA designated leave, and that she remained entitled to be restored to her position through December 1996 when she was able to return to work. Wolverine concedes that it did not formally designate Ragsdale's leave as FMLA-qualifying but argues that the DOL regulations are invalid because they impermissibly expand the scope of rights conferred on

employees under the FMLA. We review the district court's grant of summary judgment de novo. See Sahulka v. Lucent Tech., Inc., 206 F.3d 763, 767 (8th Cir. 2000).

A. Chevron Standard of Review

In Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), the Supreme Court explained the analysis that a court must utilize when reviewing agency decisions which apply or interpret a statute that the agency administers. The Chevron test has two parts. First, a reviewing court must determine whether congressional intent is clear from the plain language of the statute. See id. at 842-43. "In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988) (citation omitted). When an analysis of the statute reveals a clear congressional intent, an agency interpretation of the statute contrary to that intent is not entitled to deference. See id. A court must not defer when it "appears from the statute or legislative history that the accommodation is not one that Congress would have sanctioned." Chevron, 467 U.S. at 845. If, however, the language of the statute is ambiguous, and the legislative history reveals no clear congressional intent, a reviewing court must defer to a reasonable agency interpretation of the statutory provision. See id. at 843. In all cases, although the level of deference afforded an agency interpretation may appear high, the court remains the final authority in matters of statutory interpretation and "must reject administrative constructions which are contrary to clear congressional intent." Id. at 843 n.9.

B. Department of Labor Employer Notice Regulations

Subchapter I of the FMLA sets forth the FMLA's substantive provisions. An

employee is eligible for FMLA leave if she has worked for a covered employer[2] for at least 1,250 hours during the preceding twelve months. See 29 U.S.C. § 2611(2)(A)(ii). The FMLA provides that an eligible employee shall be entitled to a total of twelve workweeks of leave during any twelve-month period for one or more of the following reasons: (1) the birth of the employee's child, (2) the placement of a child with the employee for adoption or foster care, (3) taking care of certain relatives with "serious health condition[s]," and (4) when the employee herself cannot "perform the functions" of her position because she suffers from a "serious health condition." See 29 U.S.C. § 2612(a)(1). After an employee has taken FMLA leave, the employee is entitled to full restoration of her prior position or restoration to an "equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment." 29 U.S.C. § 2614(a)(1).

The FMLA directs the Secretary of Labor to, inter alia, "prescribe such regulations as are necessary to carry out subchapter I." 29 U.S.C. § 2654. Although the FMLA does not itself require that the employer designate leave as FMLA leave, the DOL regulations do require such designation. Seizing on the lack of employer notice provisions in the text of the statute, the DOL has issued a series of regulations requiring that an employer provide an employee with notice that company leave is FMLA leave both in situations where the employee is taking paid leave and where the employee is taking unpaid leave and providing for severe consequences for the failure to give employees such notice. The DOL has mandated that "[i]n all circumstances, it is the employer's responsibility to designate leave, paid or unpaid, as FMLA-qualifying, and to give notice of the designation to the employee as provided in this section . . . ." 29 C.F.R. § 825.208(a). In two separate regulations, the DOL provides that failure to notify an employee that leave taken pursuant to the company leave policy is also

[2]The reach of the FMLA is relatively limited. It only applies to, among other entities, private-sector employers of fifty or more employees. See 29 U.S.C. § 2611(4)(A)(i).

designated as FMLA leave will result in the employee still retaining her twelve week FMLA "entitlement." In 29 C.F.R. § 825.208(c), the DOL applies the principle to paid leave under an employer provided leave program, stating:

> If the employer has the requisite knowledge to make a determination that the paid leave is for an FMLA reason at the time the employer either gives notice of the need for leave or commences leave and fails to designate the leave as FMLA leave (and so notify the employee in accordance with paragraph (b)), the employer may not designate leave as FMLA leave retroactively, and may designate only prospectively as of the date of notification to the employee of the designation. In such circumstances, the employee is subject to the full protections of the Act, but none of the absence preceding the notice to the employee of the designation may be counted against the employee's 12-week FMLA leave entitlement.

29 C.F.R. § 208(c). The DOL also applies the principle to unpaid employer provided leave, stating: "[i]f an employee takes paid or unpaid leave and the employer does not designate the leave as FMLA leave, the leave taken does not count against an employee's FMLA entitlement." 29 C.F.R. § 825.700(a).

As stated above, the issue before the court is whether the above-quoted DOL regulations are a permissible interpretation of the FMLA. Recently, several courts have addressed this precise question and have come to differing conclusions, resulting in a split of authority. Compare McGregor v. Autozone, Inc., 180 F.3d 1305 (11th Cir. 1999) (striking down the regulations because they improperly expand the substantive guarantees of the statute); Schloer v. Lucent Tech., Inc., 2000 WL 128698 (D. Md. 2000) (same); Neal v. Children's Habilitation Ctr., 1999 WL 706117 (N.D. Ill. 1999) (same); Donnellan v. New York City Transit Auth., 1999 WL 527901 (S.D.N.Y. 1999) (criticizing the regulations but finding for the employer on narrower ground); with Plant v. Morton Int'l, Inc., 2000 WL 572458 (6th Cir. 2000) (distinguishing between notice requirements for paid as opposed to unpaid leave but appearing to uphold both 29 C.F.R. §§ 825.208(c) and 825.700(a) as valid exercises of regulatory power); Ritchie

v. Grand Casinos of Mississippi, Inc., 49 F.Supp.2d 878 (S.D. Miss. 1999) (holding that the DOL's regulations appropriately "filled the gaps" of the FMLA); Chan v. Loyola Univ. Med. Ctr., 1999 WL 1080372 (N.D. Ill. 1999) (same).

We agree with the Eleventh Circuit that the DOL's regulations improperly "convert[] the statute's minimum of federally-mandated unpaid leave into an entitlement to an additional 12 weeks of leave unless the employer specifically and prospectively notifies the employee that she is using her FMLA leave." McGregor, 180 F.3d at 1308. The FMLA was intended only to set a minimum standard of leave for employers to provide to employees. Under the FMLA, twelve weeks of leave is both the minimum the employer must provide and the maximum that the statute requires. The provisions of the FMLA are noticeably bereft of any purpose to interfere with employer leave policies which grant greater leave rights than the FMLA or to require more generous leave plans than the minimum twelve weeks of unpaid leave mandated by the FMLA. See 29 U.S.C. § 2652(a)("Nothing in this Act or any amendment made by this Act shall be construed to diminish the obligation of an employer to comply with any collective bargaining agreement or any employment benefit program or plan that provides greater family or medical leave rights to employees than the rights established under this Act or any amendment made by this Act"); 29 U.S.C. § 2653(b) ("Nothing in this Act or any amendment made by this Act shall be construed to discourage employers from adopting or retaining leave policies more generous than any policies that comply with the requirements under this Act or any amendment made by this Act."); 29 U.S.C. § 2612(d)(2)(B) ("nothing in this subchapter shall require an employer to provide paid sick leave or paid medical leave in any situation in which such employer would not normally provide any such paid leave").

The terms of the statute contemplate only that the employer will be required to provide a "total" of twelve weeks of unpaid leave. Entirely absent from the text of the FMLA is any indication that the FMLA was designed to entitle an employee to additional leave under the FMLA when the employer's leave plan already provides for

twelve weeks of FMLA qualifying leave. See 29 U.S.C. § 2612(a)(1) ("employee shall be entitled to a total of 12 workweeks of leave during any 12-month period") (emphasis supplied); 29 U.S.C. § 2612(d)(1) ("If an employer provides paid leave for fewer than 12 workweeks, the additional weeks of leave necessary to attain the 12 workweeks of leave . . . may be provided without compensation") (emphasis added).

The FMLA does define the relationship between FMLA leave and employer-provided paid leave when an employee takes leave that qualifies as FMLA leave. It provides:

> An eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, or medical or sick leave of the employee . . . for any part of the 12-week period of such leave under such subsection, except that nothing in this subchapter shall require an employer to provide paid sick leave or paid medical leave in any situation in which such employer would not normally provide any such paid leave.

29 U.S.C. § 2612(d)(2)(B). The obvious purpose of § 2612(d)(2)(B) is to ensure that neither an employee nor an employer will be disadvantaged by the existence of the FMLA. The provision enables the employee to take advantage of *paid* employer-provided leave that the employee would be entitled to regardless of the existence of the FMLA. The provision also protects the employer; if an employee requests FMLA leave, the employer can require that the employee also use employer-provided leave thereby, if providing at least twelve weeks of leave, saving itself from having to extend more leave than provided for in its leave policy. The DOL has failed to appreciate and differentiate those circumstances when notice should be required from employers in order to protect employees' substantive FMLA rights from those situations where notice is not necessary to protect FMLA rights. Rather than simply recognizing that the purpose of § 2612(d)(2)(B) was to disadvantage neither employer nor employee by the existence of the FMLA when the employer already has a sufficient leave policy in

place, the Secretary of Labor has apparently seized upon the "employer may require" provision in § 2612(d)(2)(B) to justify the imposition of a disproportionate penalty in all cases where employers fail to designate leave as FMLA leave.

Other sections of the FMLA strongly support the view that where Congress desired explicit notice provisions with significant consequences for their violation, it provided for them in the text of the statute. In 29 U.S.C. § 2612(e)(1), the statute details notice obligations of employees to employers when the employee requests qualifying leave under the FMLA. See Carter v. Ford Motor Co., 121 F.3d 1146 (8th Cir. 1997) (holding that an employee merely informing the employer that he would be out and did not know when he would return and offering no further information was not adequate notice under the FMLA). In 29 U.S.C. § 2614(b)(1)(A), the FMLA allows an employer to refuse to restore a "highly compensated employee" to his or her former position if holding open the position would cause "substantial and grievous economic injury to the operations of the employer." 29 U.S.C. § 2614(b)(1)(A). In order to do so, however, the employer must give notice to the employee "at the time the employer determines such injury would occur" that the employer does not intend to restore the employee to his or her position. See 29 U.S.C. § 2614(b)(1)(B); see also 29 U.S.C. § 2619 (assessing monetary penalties for employers who do not post notices on the premises of the employer explaining FMLA rights).

Similar to the statutory text, the FMLA's legislative history supports the view that the FMLA was intended only to be a statute that provided a minimum labor standard; an assurance that employers would provide employees with twelve weeks of leave every year. See S. Rep. No. 103-3, at 4 (1993), reprinted in 1993 U.S.C.C.A.N. 3, 6 (stating that the FMLA "accommodates the important societal interest in assisting families, by establishing a minimum standard for leave. The bill is based on the same principle as the child labor laws, the minimum wage, Social Security, the safety and health laws, the pension and welfare benefit laws, and other labor laws that establish minimum standards for employment"); S. Rep. No. 103-3, at 28 (1993), reprinted in

U.S.C.C.A.N. 3, 30 ("Section 102(d) assures that an employee is entitled to the benefits of applicable paid leave, plus any remaining leave time made available by the act on an unpaid basis"). Any other view of the statute would likely upset the careful compromise reached by Congress when it passed the FMLA. See H.R. Rep. No. 135(I), at 37 (1991) ("The amount of time available for leave also reflects a compromise. The leave period was reduced to 12 weeks in response to concerns raised by employers who maintained that it was significantly easier to adjust work schedules or find temporary replacements over the shorter time period. While not ideal from the employees' perspective, a twelve week minimum represents a middle ground between the family needs of workers and an employer's business needs.").

The DOL regulations must be struck down. Although courts must defer to agency expertise, this Court cannot abrogate its mandate as the "final authority on issues of statutory construction" and must "reject administrative constructions which are contrary to clear congressional intent." Chevron, 467 U.S. at 843 n.9. The DOL regulations create rights which the statute clearly does not confer. While the statute only requires the employer to provide twelve weeks of unpaid leave, under the DOL regulations, the employer could be forced to provide much more leave. The FMLA was intended to "balance the demands of the workplace with the needs of families," 29 U.S.C. § 2501(b)(1), "in a manner that accommodates the legitimate interests of employers," 29 U.S.C. § 2601(b)(3). The DOL regulations dispense with any pretense of balancing in favor of rigid and unnecessary regulations that penalize unwary employers.

It should be stressed that the court is not holding that any DOL regulations requiring employers to designate leave as FMLA leave would be invalid. There are various situations in which an employer's failure to give notice may function to interfere with or to deny an employee's substantive FMLA rights. For example, notice could be necessary where the employee claims that the sole reason she exceeded her FMLA leave was due to the employer's failure to notify her that her leave was designated as

FMLA leave and if she had been so notified, she would have returned to work at the end of the twelve weeks. See Longstreth v. Copple, 189 F.R.D. 401 (N.D. Iowa 1999). Also, in some cases where the leave was anticipated, an employer's failure to provide notice that the leave counts against the FMLA entitlement could interfere with the employee's ability to plan and use future FMLA leave.

Although some situations may require employer notice, this case is not one of them. The DOL regulations improperly convert the FMLA into a statute which always provides an additional twelve weeks of leave unless the employer specifically notifies the employee prospectively that she is using her FMLA leave. This is not consistent with the purpose of the FMLA. Congress only intended to mandate a minimum of twelve weeks of leave for employees, it did not intend to construct a trap for unwary employers who already provide for twelve or more weeks of leave for their employees. It is undisputed that Wolverine's employee leave program was far more generous than the baseline established by the FMLA. Under Wolverine's leave program, Ragsdale was allowed a maximum of thirty weeks of company leave, which she exhausted in full. During this time, Wolverine maintained Ragsdale's health insurance benefits, and even exceeded the requirements of the FMLA by paying Ragsdale's insurance premiums for six months. Moreover, Wolverine held Ragsdale's position open for her during the entire thirty weeks of leave.

Ragsdale's medical condition rendered her unable to work for substantially longer than the FMLA twelve-week period. To find that Wolverine's technical violation of the designation regulations functions as a denial of Ragsdale's FMLA rights would be an egregious elevation of form over substance; a result clearly not contemplated by the FMLA. In this case, the regulations directly contradict the statute by increasing the amount of leave that an employer must provide. Consequently, this court must hold 29 C.F.R. § 700(a) invalid insofar as it purports to require an employer to provide more than twelve weeks of leave time.

III. CONCLUSION

In sum, we affirm the district court's judgment holding that the DOL regulations are not based on a permissible interpretation of the FMLA and that, consequently, Ragsdale's FMLA claim must be dismissed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
JONESBORO DIVISION

TRACY RAGSDALE
PLAINTIFF

V. NO. J-C-97-475

WOLVERINE WORLDWIDE, INC
d/b/a FROLIC FOOTWEAR
DEFENDANT

ORDER

Presently before the Court are Plaintiff and Defendant's cross-motions for summary judgment on Plaintiff's claims under the Family and Medical Leave Act and Defendant's motion for summary judgment on Plaintiff's claims under the Americans With Disabilities Act and the Arkansas Civil Rights Act.

I. Background

Plaintiff Tracy Ragsdale began her employment with Defendant Wolverine World Wide, Inc. on March 17, 1995. She was diagnosed with cancer in February of 1996, and requested medical leave from Defendant on February 21, 1996. Defendant granted her request, and her leave commenced on that date. Defendant did not notify Plaintiff of her eligibility under the Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601-2654 ("FMLA"), or her right to have leave designated as FMLA leave.

Defendant's company leave policy allowed employees with six months of service to take leave for up to seven months. The leave policy required employees on leave to submit requests for extensions of leave every thirty days. Consistent with that requirement, Plaintiff requested extensions of her leave on March 18, April 22, May 21, June 20, July 22 and August 15 of 1996. Each request for an extension was granted by Defendant. On September 20, 1996, Plaintiff was terminated because she had exhausted her seven months of company provided leave. On September 26, 1996, Plaintiff returned to Defendant's facility and requested additional FMLA leave. She was informed that she had exhausted all of her leave. Plaintiff then requested that she be allowed to return to work on a reduced hour schedule. Her request was denied.

Plaintiff's physician released her to work in December of 1996, and she has been actively employed in full-time positions since December 31, 1996. Plaintiff is no longer being treated for cancer and she is currently capable of working without restrictions.

On December 22, 1997, Plaintiff filed suit against Defendant alleging claims under the Family and Medical Leave Act, the American's with Disabilities Act of 1990, 42 U.S.C. § 12101, *et seq* ("ADA") and the Arkansas Civil Rights Act of 1993, Ark. Code Ann. § 16-123-101, *et seq* ("Arkansas Act"). Both Plaintiff and Defendant have filed motions for summary judgment with respect to the FMLA claim. Defendant has also filed a motion for summary judgment with respect to the ADA and Arkansas Act claims.[1]

II. Summary Judgment Standard

Summary judgment is appropriate when the Court finds that there is no genuine issue as to any material fact, and that the moving party is entitled to a judgment as a matter of law. Fed. R. Civ.

[1] Plaintiff's motion to voluntarily dismiss her disparate treatment claims, hostile environment claims, and FMLA retaliation claim is hereby granted.

P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The party opposing summary judgment may not rest on its pleadings but must present "significant probative evidence" demonstrating that a genuine dispute of material fact exists, and that the moving party is not entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). The Court must view these materials in the light most favorable to the nonmovant, drawing all reasonable inferences in the nonmovant's favor. *Id.* at 255. The moving party bears the initial burden of informing the court of the basis for the motion and of identifying those parts of the record which demonstrate absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. Once the moving party has met its burden, the nonmovant may not rely on conclusory allegations or mere conjecture, but rather must offer specific facts to support a verdict in its favor. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) (construing Fed. R. Civ. P. 56(e)). As to any claim, or essential element thereof, for which the nonmoving party bears the burden of proof at trial, the nonmoving party must make a showing sufficient to establish the existence of that claim or element.

III. Discussion

A. Plaintiff's FMLA Claim

The FMLA provides eligible employees the benefit of leave time for family and medical emergencies. The FMLA provides that employers must allow employees up to twelve weeks of leave in a year if the leave is requested for one of the purposes specified in the statute, including an employee's "serious health condition that makes the employee unable to perform the functions of the position of such employee." 29 U.S.C. § 2612(a)(1)(D). At the end of the leave, the employee must be reinstated to his or her position or to a position equivalent in pay, benefits, and other terms and

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conditions of employment. *See* 29 U.S.C. § 2614(a)(1). In the present case, there is no dispute that Plaintiffs' bout with cancer was a "serious health condition" within the purview of the Act. There is also no dispute that Plaintiff provided proper notice to Defendant of her need for medical leave, and that Defendant was fully informed as to the nature of Plaintiff's condition so that Defendant could have determined Plaintiff's eligibility under the FMLA. Thus, the only issues to be determined are (1) whether Plaintiff was an eligible employee, and (2) whether Defendant violated the FMLA in failing to provide her with 12 additional weeks of FMLA leave and reinstatement.

1. *Plaintiff's Eligibility*

The FMLA defines the term "eligible employee" as one who has been employed (i) for at least 12 months by the employer with respect to whom leave is requested ...; and (ii) for at least 1,250 hours of service with such employer during the previous 12-month period. 29 U.S.C. § 2611(2)(A). In other words, to be eligible an employee must have been employed "for at least 1,250 hours of service during the 12-month period immediately preceding the commencement of the leave." 29 C.F.R. 825.110(a)(2). When Plaintiff first requested leave on February 21, 1996, she had not been employed by Defendant for the requisite twelve-month period. Thus, she was ineligible. When Plaintiff subsequently requested an extension of her leave on March 18, 1996, she had met all of the requirements for eligibility under the FMLA.

Plaintiff contends that her eligibility under the FMLA should have been determined as of her March 18, 1996 request for leave. Defendant, on the other hand, argues that eligibility for FMLA leave must only be determined on the date that leave first commenced (in this instance February 21, 1996). Defendant contends that Plaintiff's March 18, 1996 request was merely a request for an extension of leave that had already commenced on February 21, 1996. Consequently, Defendant

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argues that Plaintiff was not an eligible employee afforded the protections of the FMLA.

There are cases holding that eligibility under the FMLA is determined at the time when leave is first granted. *See, e.g., Barron v. Runyon*, 11 F. Supp. 2d 676 (E.D. Va. 1998); *Lacoparra v. Pergament Home Centers, Inc.*, 982 F. Supp 213 (S.D. N.Y. 1997). These cases primarily involved intermittent leave situations, where an employee took leave at various periods in between periods of employment. The defendants argued that an employee who was initially eligible for leave could thereafter lose her FMLA eligibility for subsequent leave requests if the employee's qualifications dropped below the threshold requirements. Essentially, these Defendants argued that an employee had to establish her eligibility at the beginning of every request for leave, regardless of whether the employee was initially eligible, and regardless of whether the request was for the same condition. The courts considering this argument have appropriately rejected it. Once an employee establishes eligibility under the FMLA for a particular condition, she should not be required to re-establish eligibility for each subsequent request for intermittent leave.

However, in the present case, Defendant seeks to misapply these holdings. Defendant argues that an employee's eligibility under the FMLA is calculated once, and only once -- at the time the employee first takes leave for a medical condition. According to Defendant, an employee beset by a serious medical condition before she has met the threshold requirements for eligibility can never be eligible for the protections of the FMLA if *any* leave is taken before the statutory requirements are met. Thus, under Defendant's theory, if an employee was diagnosed with cancer after working 11 months and 29 days and then took leave on that date, she would be forever barred for receiving FMLA benefits related to that particular bout with cancer. However, if the same employee waited two days before taking her leave, she would be afforded the full protection of the FMLA. In the

opinion of the Court, this construction of the eligibility requirements does not make sense. Certainly FMLA eligibility may not be stripped away, but that does not necessarily mean that eligibility could not be subsequently acquired through the passage of time.

In this case, Plaintiff first requested leave when she was ineligible for FMLA benefits. She then requested additional leave one month later when she was eligible. Accordingly, Plaintiff was entitled to the protections afforded by the FMLA.[2]

2. *FMLA Violation*

Defendant admits that it never informed Plaintiff of her FMLA eligibility following her requests for leave, and also never designated in writing that Plaintiff's leave was to be counted against her FMLA entitlements. Plaintiff points to the regulations, arguing that liability has been established.

The regulations promulgated by the Department of Labor clearly place the burden upon the employer to inform an employee whether leave is designated as FMLA leave. *See* 29 C.F.R. § 825.208 ("in all circumstances, it is the employer's responsibility to designate leave, paid or unpaid, as FMLA-qualifying, and to give notice of the designation to the employee as provided in this section"). According to the regulations:

> If the employer has the requisite knowledge to make a determination that the paid leave is for an FMLA reason at the time the employee either gives notice of the need for leave or commences leave and fails to designate the leave as FMLA leave (and so notify the employee in accordance with paragraph (b)), the employer may not designate leave as FMLA leave retroactively, and may designate only prospectively as of the date of notification to the employee of the designation. In such circumstances, the employee is subject to the full protections of the Act, but none of

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[2] In light of this ruling, the Court need not consider whether Plaintiff would have been "deemed eligible" under 29 C.F.R. § 825.110(d). The Court notes, however, that there is persuasive authority finding this regulation invalid because it is inconsistent with the text and intent of the FMLA. *See Wolke v. Dreadnought Marine, Inc.*, 954 F.Supp. 1133, 1134 (E.D. Va. 1997).

> the absence preceding the notice to the employee of the designation may be counted against the employee's 12-week FMLA leave entitlement.

29 CFR § 825.208. The regulations further state that "if an employee takes paid or unpaid leave and the employer does not designate the leave as FMLA leave, the leave taken does not count against an employee's FMLA entitlement." 29 C.F.R. § 825.700(a).

Based upon the plain language of the regulations, it would appear that there is no genuine issue of material fact as to whether Defendant violated the Act. However, Defendant argues that under the facts of this case, no violation can be found as a matter of law because Defendant provided Plaintiff more leave than required by the FMLA, as well as all of the other protections contained in the FMLA.

Indeed, the undisputed facts demonstrate that Defendant's employee leave program was far more generous than the baseline established by the FMLA. Under Defendant's company leave program, Plaintiff was allowed a maximum of 30 weeks of company leave, which she exhausted in full. During this time, Defendant maintained Plaintiff's health insurance benefits, and even exceeded the requirements of the FMLA by paying Plaintiff's insurance premiums for six months. Defendant also held Plaintiff's position open for her during the entire 30 weeks of leave. According to Defendant, these facts preclude any liability for technical violation of the Act or the Regulations.

There is an abundance of case law supporting Defendant's position. Several courts have directly held that there could be no FMLA violation where an employee was provided greater than twelve weeks of leave. *See, e.g., Haggard v. Farmers Ins. Exchange*, 1996 WL 146048 (D. Or. 1996); *Kur v. Fox Valley Press, Inc.*, 1997 WL 89140 at *3-4 (N.D. Ill. 1997). These particular courts have based their holdings on the text of the FMLA itself, without consideration of the

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regulations. However, one court that did consider the regulations reached the same result, concluding that the regulations impermissibly conflicted with the FMLA. *See Cox v. AutoZone, Inc.*, 990 F. Supp 1369 (M.D. Ala. 1998). In *Cox*, the defendant's company leave policy allowed for employees to take 13 weeks of paid leave. The plaintiff took 15 weeks of leave due to her pregnancy, but the defendant failed to designate the leave as FMLA qualifying. When plaintiff was denied a return to her original position at the end of the 15 weeks, she argued that she was still entitled to an additional 12 weeks of FMLA leave.

The court's description of the plaintiffs' position in *Cox* is identical to the position advanced by Plaintiff here:

> Plaintiff is, in effect, converting FMLA from a statute which provides a minimum, a baseline, of federally mandated unpaid leave, into a statute which mandates an additional 12 weeks of leave for all employees, even those who already have employer-provided leave. This is inconsistent with the text and guarantees of the statute.

Cox, 990 F. Supp. at 1373. The court then undertook an extensive analysis of the legislative intent behind the FMLA and the glaringly inconsistent regulations adopted by the Department of Labor. The court found "a clear intent of Congress to protect only those workers who take 12 or fewer weeks of leave." *Id.* at 1380. With respect to the regulations, the court found that they "added requirements which not only go beyond those of the statute, but which are inconsistent with the stated purpose of the statute and which would grant entitlements which were not given by Congress." *Id.* 1381. The court ultimately granted summary judgment for the defendant.

The Court finds the reasoning in *Cox* persuasive and squarely applicable to the present case. Here, Plaintiff took 30 weeks of company provided leave and reaped additional benefits far exceeding those provided by the FMLA. Accordingly, she was not entitled to an additional 12 weeks of FMLA

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leave. Plaintiffs' motion for summary judgment as to liability on her FMLA claim is hereby denied. Defendant's motion for summary judgment on Plaintiffs' FMLA claim is hereby granted.

B. Plaintiffs' ADA and Arkansas Civil Rights Act Claims for Failure to Accommodate[3]

The ADA prohibits an employer from discriminating against an employee "because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). As defined by the ADA, "discrimination" includes:

> Not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless ... [the employer] can demonstrate that the accommodation would impose an undue hardship on the operation of the ... [employer's] business.

Id. § 12112(b)(5)(A). "Disability" is defined as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102 (2). "[O]therwise qualified" means that the individual, "with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." *Id.* § 12111(8). Thus, to establish a claim under the ADA, Plaintiff must show (1) that she has a disability; (2) that she is qualified to perform the essential functions of the job, with or without

[3] The Court will look to case law interpreting the ADA in assessing Plaintiff's failure to accommodate claim under the Arkansas Act. While the Arkansas Act does not specifically address the right to an accommodation of a physical or mental disability, it does refer to the right of an "otherwise qualified person" to "obtain and hold employment without discrimination." Ark. Code Ann. § 16-123-107.

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reasonable accommodation; and (3) that she has suffered adverse employment action because of her disability. *Benson v. Northwest Airlines, Inc.*, 62 F.3d 1108, 1112 (8th Cir.1995) (*citing Wooten v. Farmland Foods*, 58 F.3d 382, 385 (8th Cir. 1995)).

Plaintiff contends that her ADA failure to accommodate claim is not subject to the burden shifting analysis set forth in *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973), citing a Seventh Circuit case, *Bultemeyer v. Fort Wayne Community Schools*, 100 F.3d 1281 (7th Cir. 1996). Although this issue has not been directly addressed by the Eighth Circuit, the rationale expressed in *Bultemeyer* is persuasive.[4] This case is not a disparate treatment case, and the *McDonnell-Douglas* burden shifting method seems unnecessary and inappropriate. As in *Bultemeyer*, Plaintiff's claim "alleges facts which, if proven, could directly establish a violation of the ADA." *Id.* at 1283. Furthermore, the reason for the discharge is not disputed. Defendant admits that it terminated Plaintiff after she exhausted her company leave (due to her cancer) and could not return to work. Accordingly, there should be no need for indirect proof or burden shifting, and the Court will not apply that framework here. But regardless of what standard is used, Plaintiff must still demonstrate a genuine issue of material fact with respect to each element of her claim.

Defendant first contends that summary judgment is warranted because there is no genuine issue of material fact that Plaintiff is not "disabled" within the meaning of the ADA. Defendant points primarily to the fact that Plaintiffs' cancer is now in remission and that Plaintiff has been gainfully employed since December of 1996.

[4] In *Dush v. Appleton Electric Co.*, 124 F.3d 957 (8th Cir. 1997), the Eighth Circuit did cite with approval the use of the burden shifting analysis in *Price v. S-B Power Tool*, 75 F.3d 362 (8th Cir. 1996). However, *Price* was a disparate treatment case, and the issue of whether burden shifting was appropriate in a failure to accommodate case was not raised in either *Dush* or *Price*.

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The ADA defines "disability" as a "physical or mental impairment that substantially limits" one or more of the major life activities of the individual claiming to have a disability. 42 U.S.C. § 12102(2). Major life activities include "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working," 29 C.F.R. § 1630.2(i), as well as "sitting, standing, lifting [and] reaching." 29 C.F.R. § 1630 app.

The record indicates Plaintiff underwent extensive radiation therapy for her cancer during the months prior to her dismissal. The record also indicates that, at least for a significant period of time, Plaintiff was "substantially limited" in many of her life activities. *See* Affidavit of Plaintiff (submitted as Exhibit "A" to Plf.'s Resp. to Def.'s Stmt. of Undisputed Material Facts). Furthermore, although Plaintiff's cancer is now in remission, her disability is to be evaluated as of the time of the employment decision. *Moore v. Payless Shoe Source*, 139 F.2d 1210 (8th Cir. 1998). After a thorough review of the record, the Court believes that there are genuine issues of material fact as to whether Plaintiff is disabled. Accordingly, summary judgment with respect to this issue would not be appropriate.

Defendant next contends that summary judgment is appropriate because Plaintiff cannot show that she was qualified to perform the essential functions of her job, with or without accommodation, nor can she demonstrate that she requested an accommodation prior to her termination. The Eighth Circuit recently stated that "an employee who is 'unable to come to work on a regular basis [is] unable to satisfy any of the functions of the job in question, much less the essential ones.'" *Moore v. Payless Shoe Source*, 139 F.3d 1210 (8th Cir. 1998)(*quoting Halperin v. Abacus Tech. Corp.*, 128 F.3d 191, 198 (4th Cir.1997)); *see also Foremanye v. Board of Community College Trustees*, 956 F.Supp. 574, 578-79 (D. Md.1996); *Rogers v. International Marine Terminals, Inc.*, 87 F.3d 755, 759 (5th Cir. 1996)(employee who, at time of termination, could not attend work due to medical condition was

not "qualified" under the ADA).

Here, the undisputed material facts demonstrate that Plaintiff was not "otherwise qualified" at the time of her termination. Plaintiff commenced medical leave pursuant to Defendant's leave program on February 21, 1996, and continued on medical leave for 7 months. *See* Def.'s Statement of Undisputed Material Facts ¶¶ 4 - 7 (admitted). Plaintiff requested six 30-day extensions of her medical leave. *Id.* ¶ 7 (admitted). On each leave request, Plaintiff's physicians stated that Plaintiff was unable to perform any work for the length of the requested leave. *Id.* ¶ 8 (admitted). For six months of Plaintiff's leave, Defendant continued to provide Plaintiff with health insurance, paying the premiums consistent with its policy. *Id.* ¶ 9 (admitted). On August 8, 1996, Plaintiff was notified of her rights to Cobra insurance continuation, but opted not to obtain Cobra coverage because she could not afford the premiums. *Id.* ¶ 10 (admitted). Plaintiff's employment with Defendant was terminated on September 20, 1996, because she had exhausted all of her company leave. *Id.* ¶ 11 (admitted). Plaintiff requested additional leave or, in the alternative, a reduced-work schedule on September 26, 1996, six days after her termination. *Id.* ¶¶ 11 - 13 (admitted).

In light of these facts, there exist no genuine issues of material fact as to whether Plaintiff was qualified to perform the essential functions of her job at the time of her termination. Plaintiff was completely unable to work for seven months prior to her termination, and she exhausted all of her company provided leave. There are absolutely no facts in the record to demonstrate that, on the date of Plaintiff's termination, Defendant had any reason to believe that Plaintiff was able to return to work or would have been able to return in the near future. In fact, the undisputed facts clearly demonstrate that she could not have returned to work. Plaintiff's physician did not release her to work until December of 1996, several months after her termination. *Id.* ¶ 14 (admitted). Furthermore, it is clear

that there was no reasonable accommodation that would have allowed Plaintiff to perform the essential functions of her employment in light of the fact that she could not work at all. Employers are not required to accommodate employees by allowing them indefinite leave.[5] *Myers v. Hose*, 50 F.3d 278, 283 (4th Cir.1995); *Hudson v. MCI Telecommunications Corp.*, 87 F.3d 1167 (10th Cir. 1996); *Watkins v. J & S Oil Co.*, 977 F. Supp. 520, 526 (D. Me. 1997). As stated by the court in *Meyers*:

> [The ADA] contain[s] no reference to an individual's future ability to perform the essential functions of his position. To the contrary, [it is] formulated entirely in the present tense, framing the precise issue as whether an individual "can" (not "will be able to") perform the job with reasonable accommodation.

Meyers, 50 F.3d at 283. And Finally, Plaintiff did not request her alleged accommodations of additional leave or a reduced work-schedule until six days following her termination. Defendant simply cannot be held liable for failing to provide an accommodation that was not requested until after Plaintiff's termination.

In sum, the ADA does not require employers to be omniscient, nor does it require employers to indefinitely maintain employees on extended medical leave. If an employee seeks to invoke the protections of the ADA, she must at a minimum produce facts demonstrating that she could have performed the essential functions of her employment with an accommodation, and that she requested the accommodation *prior* to her termination. In this instance the record conclusively demonstrates that Plaintiff could not (and in fact did not) meet these requirements. Accordingly, Defendant's motion for summary judgment with respect to Plaintiff's ADA and Arkansas Civil Rights Act claims is hereby granted.

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[5] This principle particularly applies in this instance because Plaintiff had already exhausted seven full months of leave at the time of her termination.

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IV. Conclusion

In accordance with the above, Plaintiff's motion for partial summary judgment (Docket # 21) is DENIED. Defendant's cross-motion for partial summary judgment (Docket # 33) is GRANTED. Defendant's second motion for partial summary judgment (Docket # 47) is GRANTED. Judgment shall be entered forthwith dismissing Plaintiff's claims in their entirety. All other pending motions are hereby DENIED as moot.

IT IS SO ORDERED this 3 day of November, 1998.

James M. Moody
United States District Judge

THIS DOCUMENT ENTERED ON DOCKET SHEET IN COMPLIANCE WITH RULE 58 AND/OR 79(a) FRCP ON 11/4/98 BY jt

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FILED
U.S. DISTRICT COURT
EASTERN DISTRICT ARKANSAS
NOV 03 1998
JAMES W McCORMACK, CLERK
By: Jean Burman DEP CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
JONESBORO DIVISION

TRACY RAGSDALE PLAINTIFF

V. NO. J-C-97-475

WOLVERINE WORLDWIDE, INC
d/b/a FROLIC FOOTWEAR DEFENDANT

JUDGMENT

On November 3, 1998, the Court entered an Order granting Summary Judgment with respect to each remaining claim set forth in Plaintiffs' Second Amended Complaint.

IT IS, THEREFORE, ORDERED AND ADJUDGED that Plaintiffs' Complaint is hereby dismissed with prejudice in its entirety.

IT IS SO ORDERED this 3 day of November, 1998.

James M. Moody
James M. Moody
United States District Judge

THIS DOCUMENT ENTERED ON
DOCKET SHEET IN COMPLIANCE
WITH RULE 58 AND/OR 79(a) FRCP
ON 11/4/98 BY it

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U.S. DISTRICT COURT
EASTERN DISTRICT ARKANSAS
AUG 11 1999
JAMES W. McCORMACK, CLERK
By: Jean Burman DEP.CLERK

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
JONESBORO DIVISION

WARREN DUPWE, Trustee in Bankruptcy
for the Tracy Ragsdale Estate; and
TRACY RAGSDALE PLAINTIFFS

vs. CASE NO. J-C-97-475

WOLVERINE WORLDWIDE, INC. d/b/a
Frolic Footwear, A Foreign
Corporation doing business
In the State of Arkansas DEFENDANT

PLAINTIFFS' NOTICE OF APPEAL

COMES NOW all Plaintiffs, by and through Counsel, who hereby give Notice that they appeal the denial of the Motion to Alter or Amend and the Judgment and Order dismissing this action to United States Court of Appeals for the Eighth Circuit. No hearing was held in this matter, so no transcript is available. The entire record is designated as the Record on Appeal.

Respectfully submitted,

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Attorneys for the Plaintiff

By: _____
L. Oneal Sutter
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Eighth Circuit Bar No. 960828

APPENDIX "C"

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 99-3319EAJ

Tracy Ragsdale; Warren E. Dupwe, Trustee in Bankruptcy for the Tracy Ragsdale Estate,

Appellants,

vs.

Wolverine Worldwide, Inc., doing business as Frolic Footwear, a foreign corporation doing business in the State of Arkansas,

Appellee.

Order Denying Petition for Rehearing and for Rehearing En Banc

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

(5128-010199)

August 8, 2000

Order Entered at the Direction of the Court:

Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX "D"

No._____

In The

SUPREME COURT OF THE UNITED STATES

____ Term, 2000

Tracy Ragsdale; Warren E. Dupwe, Trustee in Bankruptcy for the Tracy Ragsdale Estate

Petitioners

Vs.

Wolverine Worldwide, Inc., doing business as Frolic Footwear, a foreign corporation doing business in the State of Arkansas

Respondent

CERTIFICATE OF SERVICE

I, L. Oneal Sutter, attorney for the Petitioners, do swear or declare that on this date, September 12, 2000, as required by Supreme Court Rule 29, I have served the enclosed Motion for Leave to Proceed *In Forma Pauperis* and Petition for a Writ of Certiorari on each party to the above proceeding or that party's counsel, and on every other person required to be served, be depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

Mr. Richard Bennett
Weintrabu, Stock, Bennett,
Grisham & Underwood, P.C.
One Commerce Square, Suite 2560
Memphis, Tennessee 38103
Attorneys for Respondents.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 12, 2000.

L. Oneal Sutter